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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROSEMARIE GONSALVES, individually,
etc., et al.,

Plaintiffs and Appellants,

v.

SHARP HEALTHCARE,

Defendant and Respondent.

D060514

(Super. Ct. No. 37-2010-92087-CU-
MM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Reversed.

Rosemarie Gonsalves, acting individually and as the administratrix of the estate of her deceased mother, Darlene Gonsalves, and Rosemarie's brother, Michael (collectively, plaintiffs),¹ appeal the summary judgment entered against them on their medical malpractice, assault and battery, and wrongful death claims against Sharp Healthcare dba

¹ Because plaintiffs share a common surname, we identify them by first name in our opinion. In so doing, we intend no disrespect or undue familiarity.

Sharp Memorial Hospital (Sharp). Because there are triable issues of fact on the causation element on which Sharp's motion was based, we reverse.

I.

FACTUAL BACKGROUND

Darlene underwent open heart surgery at Sharp on May 16, 2008. Several days after the surgery, she developed fluid around her lungs that impaired respiration. Darlene's pulmonologist ordered insertion of a chest tube to drain the fluid. The pulmonologist expected the interventional radiologist who actually inserted the chest tube would discuss the risks and benefits of the procedure with Darlene before doing the procedure.

On May 27, 2008, two nurses telephoned Rosemarie to request consent for the chest tube placement, apparently because Darlene suffered from dementia and was unable to consent and Rosemarie had a durable power of attorney for Darlene. Neither nurse explained any risk or benefit of the procedure, but one assured Rosemarie, "It's no big deal." Rosemarie consented to the chest tube placement, and the nurses completed a form documenting the telephonic consent and placed the form in Darlene's hospital chart.

On May 28, 2008, Keith Kortman, M.D., performed the chest tube placement. Before performing the procedure, Dr. Kortman did not discuss the risks or benefits of the procedure with Darlene "because she was obtunded." Dr. Kortman was also unaware whether anyone else had discussed with Darlene the risks and benefits of the chest tube placement. Dr. Kortman did not discuss these matters with a member of Darlene's family either, because he "deemed that this procedure was emergent" — i.e., it "need[ed] to be

done right now" — "and therefore that there was not sufficient time to reach a family member to discuss the procedure with them."

During the placement of the chest tube, Dr. Kortman punctured Darlene's aorta with the catheter, "requiring emergent operative removal." Darlene immediately underwent surgery at Sharp to repair the aortic injury, as well as related injuries to her lung tissue and pulmonary vein. She convalesced at Sharp and a rehabilitation center until she was discharged in December 2008.

Over the next year, Darlene's health steadily deteriorated, necessitating multiple hospitalizations at various facilities. Darlene ultimately died in January 2010, due in part to the "physiological stress" caused by the aortic puncture and related injuries that occurred during the chest tube placement.

II.

PROCEDURAL BACKGROUND

Plaintiffs sued Sharp and Dr. Kortman² for damages. On behalf of Darlene's estate, Rosemarie asserted claims of medical malpractice and assault and battery.³ On their own behalf, Rosemarie and Michael asserted a wrongful death claim.

The gist of plaintiffs' complaint was that neither Sharp nor Dr. Kortman obtained informed consent⁴ before performing the chest tube placement during which Darlene's

² Dr. Kortman is not a party to this appeal.

³ Rosemarie also asserted a claim for elder abuse (Welf. & Inst. Code, § 15600 et seq.) on behalf of Darlene, but later dismissed it. That claim is therefore not at issue on this appeal.

aorta was punctured. Plaintiffs alleged consent to the procedure would not have been given had its risks been properly explained. As a result of the failure to obtain informed consent, plaintiffs alleged that during the chest tube placement Darlene sustained "a harmful or offensive contact with [her] body" and other injuries that required hospitalization, and that she ultimately died.

Sharp answered the complaint, asserting a general denial and various affirmative defenses. As its "third affirmative defense," Sharp alleged the events alleged in plaintiffs' complaint were proximately caused by entities other than Sharp.

Sharp moved for summary judgment or, alternatively, summary adjudication, on the ground that plaintiffs could not establish causation. In support of the motion, Sharp relied primarily on the deposition testimony of Rosemarie and Dr. Kortman summarized in part I., *ante*, to argue:

"Contrary to Plaintiffs' theory of medical negligence as to Sharp, the Sharp nurses did *not* undertake to have an informed consent discussion with Rosemarie . . . , and Dr. Kortman did *not* rely on the form the nurses executed and consequently forego his own informed consent discussion with the patient or her family representative. [Rosemarie's] testimony establishes that neither nurse discussed any[thing] regarding risks or benefits of the planned CT guided chest tube placement, and/or any alternative treatment(s). Dr. Kortman's testimony establishes that he did not even see the form signed by the nurses before his deposition, much less before he began the chest tube placement and that, absent what he deemed

⁴ The doctrine of informed consent provides that "as an integral part of a physician's overall obligation to the patient there is a duty of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 243 (*Cobbs*)). "The duty to disclose was imposed in *Cobbs* so that patients might meaningfully exercise their right to make decisions about their own bodies." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 292 (*Truman*)).

to be an emergency situation, he would have called the patient's daughter and had an informed consent discussion with her before beginning the procedure. Dr. Kortman's testimony also establishes that he was aware that nurses were not permitted to have informed consent discussions with patients or their family representatives.

"Thus, neither the nurses' telephone conversation with Rosemarie . . . nor the hospital form they executed caused Dr. Kortman to perform the procedure without first conducting an informed consent discussion himself. Because Plaintiffs cannot present any evidence of [a causal link] between the nurses' conduct and Dr. Kortman's performance of the CT guided chest tube placement which they allege ultimately caused Darlene['s] death, Plaintiffs' [claims] must fail."

Sharp also submitted a declaration from a cardiologist who stated, to a reasonable degree of medical probability, that the aortic puncture during the chest tube placement "had nothing to do with [Darlene's] death over a year and a half later," and that instead she died of a myocardial infarction due to preexisting medical conditions.

Plaintiffs opposed Sharp's motion.⁵ In support of their opposition, they submitted a declaration from a registered nurse who stated that the Sharp nurses failed to follow hospital procedures and breached the standard of care concerning informed consent. Plaintiffs also submitted a declaration from a radiologist who stated that Darlene's chest tube placement was not emergent and that Dr. Kortman breached the standard of care by not obtaining written informed consent before performing the procedure. Finally,

⁵ Plaintiffs did not oppose the summary judgment motion to the extent it challenged the assault aspect of the claim labeled assault and battery. At the hearing on the motion, plaintiffs' counsel stated: "I will concede today that I don't think assault is present. . . . Medical battery's what I'm going for." Plaintiffs thus abandoned the assault portion of their assault and battery claim in the trial court, and we do not discuss it further. (See *Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 50-51 [plaintiff bound on appeal by concession in trial court that claim had no merit].)

plaintiffs submitted a declaration from a pathologist who performed an autopsy on Darlene. The pathologist stated the aortic puncture during the chest tube placement caused Darlene's health to decline and, to a reasonable degree of medical probability, was a substantial factor in causing her death.

The trial court agreed with Sharp's causation arguments and granted its motion for summary judgment. As to the medical malpractice and wrongful death claims, the court ruled that Sharp's evidence was "sufficient to establish that none of the actions or inactions of the Sharp nurses caused Dr. Kortman to perform the procedure on Darlene . . . without first having his own informed consent discussion with either Darlene . . . or a family member Plaintiffs fail to offer any evidence in dispute." As to the battery claim, the court noted that Sharp had submitted evidence that nobody other than Dr. Kortman touched Darlene during the chest tube placement, and that Sharp nurses did not cause him to perform the procedure without first obtaining informed consent. The court ruled: "Absent evidence that a Sharp employee touched Darlene . . . , or evidence that Sharp caused Dr. Kortman to perform the procedure [without] first obtaining informed consent, there is no basis for a finding that any Sharp employee caused an unconsented-to touching of Darlene . . . or that Sharp performed or caused to be performed an unconsented-to medical procedure." Based on these rulings, the court entered a separate judgment in favor of Sharp and against plaintiffs.

III.

DISCUSSION

Plaintiffs contend the trial court erred in granting Sharp's motion for summary judgment. According to plaintiffs, the expert witness declarations and medical records they submitted in opposition to Sharp's motion raised triable issues of fact as to whether Sharp caused the injuries alleged in the complaint. We agree.

A. *Standard of Review*

A defendant may move for summary judgment on the ground "the action has no merit," i.e., as to each cause of action at issue, the plaintiff cannot establish an essential element or the defendant has a complete defense. (Code Civ. Proc., § 437c, subds. (a), (o).) To prevail on a motion for summary judgment, the defendant must show there are no triable issues of material fact, and under the applicable law the plaintiff cannot prevail on any asserted cause of action. (*Id.*, § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) On appeal from a summary judgment in favor of the defendant, we review de novo the record that was before the trial court when it ruled on the motion, resolving any doubts in the evidence in favor of the plaintiff. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 757 (*Cole*).)

B. *Analysis*

"The first step in analyzing any motion for summary judgment is to identify the elements of the challenged cause of action or defense in order to isolate those targeted by the motion." (*Cole, supra*, 205 Cal.App.4th at p. 757.) Here, plaintiffs asserted claims

for medical malpractice, wrongful death and battery; and in each claim they alleged that Sharp's failure to obtain informed consent for the chest tube placement resulted in injuries to, and ultimately the death of, Darlene. Because "a medical act performed without a patient's informed consent (such as the [chest tube placement] here) is medical negligence, not battery" (*Massey v. Mercy Medical Center Redding* (2009) 180 Cal.App.4th 690, 698), and because plaintiffs' wrongful death claim is essentially a medical malpractice claim with the injury element being Darlene's death (Code Civ. Proc., § 377.60; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404), we analyze plaintiffs' claims collectively as a medical malpractice claim. Further, because Sharp's motion for summary judgment specifically challenged only the causation element of plaintiffs' claims, we assume without deciding that plaintiffs can establish that Sharp owed Darlene a duty to obtain informed consent, that Sharp breached that duty, and that plaintiffs sustained damages. (See *Turpin v. Sortini* (1982) 31 Cal.3d 220, 229-230 [listing elements of medical malpractice claim].) We must decide only whether Sharp established that plaintiffs cannot prove "a proximate causal connection" between its failure to obtain informed consent and the alleged injuries to and death of Darlene. (*Id.* at p. 229.)

In general, to establish causation in a tort case, including a medical malpractice action, the plaintiff must prove the defendant's act or omission was a "substantial factor" in bringing about the plaintiff's harm. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 876; *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1092-1093.) To establish that a failure to obtain informed consent was a substantial factor in bringing

about a patient's injury, the patient must prove that a reasonable person in the patient's circumstances would have declined the recommended treatment or procedure had the patient been adequately informed of the associated risks. (*Cobbs, supra*, 8 Cal.3d at p. 245; *Warren v. Schechter* (1997) 57 Cal.App.4th 1189, 1206.) To defeat causation, a defendant must show either (1) that the plaintiff cannot prove a reasonable person in the patient's condition would have refused the recommended treatment or procedure had its significant risks been adequately disclosed (*Spann v. Irwin Memorial Blood Centers* (1995) 34 Cal.App.4th 644, 657 (*Spann*)), or (2) "that even though a reasonably prudent person might not have undergone the procedure if properly informed of the perils, this particular [patient] still would have consented to the procedure" (*Warren*, at p. 1206).

Sharp did not make either of the above showings on its motion for summary judgment. Although plaintiffs alleged that Darlene would not have consented to the chest tube placement had Sharp advised her of the risks of the procedure, Sharp submitted no evidence refuting this allegation. Nor did Sharp submit a declaration or other evidence establishing that a reasonable person in Darlene's circumstances, if properly informed of the risks of chest tube placement, would have agreed to undergo the procedure. The only evidence Sharp submitted that even remotely touched on this issue was Dr. Kortman's deposition testimony that he considered Darlene's chest tube placement "emergent." It is true that informed consent need not be obtained in cases of emergency, because the law implies consent in such cases. (*Cobbs, supra*, 8 Cal.3d at p. 243.) But, plaintiffs disputed the existence of an emergency by submitting a declaration from a radiologist who stated, based on his review of the medical records and other evidence, that Darlene's

chest tube placement "was not emergent." Indeed, Sharp conceded in its reply papers that whether Darlene "required the chest tube to be placed emergently is a triable issue of fact." In light of this factual dispute and the absence of any evidence about the comparative risks of the chest tube placement and the respiratory problems Darlene was suffering at the time of the procedure, we cannot say *as a matter of law* that no reasonable person in Darlene's condition, even if adequately informed of the risks, would have refused the procedure. (Cf. *Spann, supra*, 34 Cal.App.4th at p. 659 [concluding no reasonable person would have refused treatment when patient's disease "*immediately* threatened her life" and risk of treatment was "infinitesimal" compared to risk of disease].) Accordingly, Sharp did not meet its burden on the summary judgment motion to show that plaintiffs cannot prove the nurses' failure to obtain informed consent from Rosemarie (who was acting on Darlene's behalf) was a substantial factor in bringing about Darlene's injuries and death.

Rather than defeat causation by demonstrating plaintiffs' inability to prove that Rosemarie or a reasonable person in Darlene's condition would have refused the chest tube placement had the nurses adequately disclosed the risks, Sharp essentially argued it was Dr. Kortman's conduct, not its nurses' conduct, that caused Darlene's injuries and death. According to Sharp, its nurses did not cause Darlene's injuries and death because Dr. Kortman performed the chest tube placement during which she suffered the aortic puncture and other complications, and he did so without first having his own informed consent discussion with Darlene or a family member and without in any way relying on

what the nurses did or did not do with regard to obtaining informed consent. The trial court accepted these arguments and granted Sharp's motion. In doing so, the court erred.

In accepting Sharp's argument that its nurses' conduct did not cause Darlene's injuries or death, the trial court erroneously seemed to assume "that an injury can have only one cause, or that only one tortfeasor can be held liable for it. In fact, of course, it is entirely possible for an injury to result from multiple tortious acts or omissions, in which case all authors of the injurious conduct may be liable, provided the conduct of each satisfies the test of proximate or legal cause as that concept has evolved over the centuries. [Citations.] Thus [Sharp] could not establish an entitlement to summary judgment merely by showing that [Dr. Kortman's conduct] was *a* cause of [Darlene's] injuries. Rather [Sharp] had to establish *as a matter of law* that plaintiff[s] would be unable to present evidence that [its nurses' conduct] was *also* a substantial causative factor in bringing about [Darlene's] injuries." (*Cole, supra*, 205 Cal.App.4th at p. 769.) Sharp did not satisfy its burden to establish that its nurses' failure to disclose the risks of the chest tube placement to Darlene did not substantially contribute to her injuries and death. As we explained above, Sharp made no showing either that plaintiffs could not prove that a reasonable person in Darlene's condition would have refused the chest tube placement had the nurses made adequate risk disclosures; or that even though a reasonable person in Darlene's condition would have refused the procedure if properly advised of the risks, Rosemarie (acting on Darlene's behalf) still would have consented to it.

In granting Sharp's summary judgment motion, the trial court also seemed erroneously to assume that Sharp cannot be held liable for Darlene's injuries and death unless its nurses' conduct caused Dr. Kortman's conduct. Sharp contended in its motion (and contends again on appeal) that "neither the nurses' telephone conversation with Rosemarie . . . nor the hospital form they executed *caused Dr. Kortman to perform the procedure without first conducting an informed consent discussion himself.*" (Italics added.) Under traditional causation principles, however, a defendant whose conduct is a substantial factor in bringing about a plaintiff's injury cannot escape liability based on the conduct of a third party unless the third party's conduct operates as a superseding cause that breaks the chain of legal causation between the defendant's conduct and the plaintiff's injury. (*Landeros v. Flood* (1976) 17 Cal.3d 399, 411; *Cole, supra*, 205 Cal.App.4th at p. 770.) To constitute a superseding cause, the third party's conduct must be an independent event that intervenes in the chain of causation to produce harm of a kind and degree so far beyond the risk the defendant should have foreseen that the law deems it unfair to hold the defendant responsible for the harm. (*In re Ethan C.* (2012) 54 Cal.4th 610, 641; *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 725.) A third party's conduct is *not* a superseding cause if the duty allegedly breached by the defendant was designed, at least in part, to protect the plaintiff from being harmed by the third party's conduct. (*In re Ethan C.*, at p. 641; *Lugtu*, at p. 725.)

Under these principles, Dr. Kortman's conduct did not constitute a superseding cause that relieved Sharp of liability for the harm to Darlene. The aortic puncture and other complications Darlene suffered as a result of Dr. Kortman's placement of the chest

tube were precisely the kinds of harm against which the duty to obtain informed consent is designed to protect a patient. As noted earlier, that duty requires disclosure of "dangers inherently and potentially involved in" a proposed medical procedure (*Cobbs, supra*, 8 Cal.3d at p. 243) so that "patients might meaningfully exercise their right to make decisions about their own bodies" (*Truman, supra*, 27 Cal.3d at p. 292). Furthermore, because the aortic puncture and other complications were foreseeable consequences of the failure to obtain informed consent to the chest tube placement, it is not unfair to hold Sharp liable for the harm. (See *In re Ethan C., supra*, 54 Cal.4th at p. 641 [intervening cause not a superseding cause unless it produces harm so unforeseeable that it would be unfair to hold defendant liable]; *Cole, supra*, 205 Cal.App.4th at p. 770 [third party misconduct not superseding cause if foreseeable by defendant].) For these reasons, Sharp may not escape liability for plaintiffs' injuries on the ground it did not cause Dr. Kortman to perform the chest tube placement. (See *Cole*, at pp. 769-771 [fact that defendant whose conduct contributed to plaintiff's injury did not cause third party's conduct that also contributed to injury did not relieve defendant of liability when third party's conduct was not a superseding cause].)

Finally, we note that in its appellate briefing, Sharp seems to suggest an alternative ground on which it was entitled to summary judgment. Sharp contends that the "obligation [to obtain informed consent] rests solely with a physician and not a hospital defendant or its non-physician employees." Sharp also asserts "[t]he evidence in this case is clear . . . [that its] nurses did not undertake to have an informed consent discussion

with Rosemarie" We may not affirm the summary judgment on this suggested alternative ground, however.

Sharp did not move for summary judgment on the ground its nurses had no duty to obtain informed consent. As noted earlier, Sharp's motion expressly targeted only the causation element of plaintiffs' claims. We ordinarily do not consider issues that could have been, but were not, litigated in the trial court. (E.g., *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1214, fn. 12; *Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11.)

Moreover, contrary to Sharp's assertions, the record indicates that its nurses may have undertaken to obtain informed consent from Rosemarie. Rosemarie testified at her deposition that two nurses telephoned her and asked for consent to the chest tube placement, but neither nurse explained any of the risks or benefits of, or alternatives to, the procedure. Sharp's written policy regarding telephonic consent requires "[h]ospital personnel [to] verify that the patient's representative and physician have discussed the patient's condition and recommended treatment, and that the patient's representative has given informed consent." Although the nurses did not comply with this policy because they did not include a physician in the telephone call with Rosemarie, they completed and placed in Darlene's chart a form that stated (falsely) that a physician had adequately explained to Rosemarie the chest tube placement, including its risks, benefits and alternatives. Having thus undertaken to obtain Rosemarie's consent to the procedure, we cannot say that as a matter of law the Sharp nurses had no duty to obtain her *informed* consent. (See *Cobbs, supra*, 8 Cal.3d at p. 242 ["the patient's consent to treatment, to be

effective, must be an informed consent"]; *Spann, supra*, 34 Cal.App.4th at p. 656, fn. 11 [it was question of fact whether blood bank staff that had direct contact with patient and attempted to obtain her informed consent before procedure owed duty to obtain informed consent].)

In sum, Sharp did not establish that there was no triable issue of fact as to whether its nurses' failure to obtain informed consent to the chest tube placement constituted a substantial factor in bringing about Darlene's injuries and death, or that it was otherwise entitled to judgment as a matter of law. Consequently, the trial court erred in granting Sharp's motion for summary judgment. (See Code Civ. Proc., § 437c, subds. (a), (c), (o)(1), (p)(2); *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 130 [triable issue of fact on causation precluded summary judgment in medical malpractice case]; *Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 942 [summary judgment motion should be denied when "it did not refute tenable pleaded theories"].)⁶

⁶ In light of this conclusion, we need not, and do not, address the parties' respective arguments concerning whether the doctrine of *res ipsa loquitur* applies to this case.

DISPOSTION

The judgment is reversed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.